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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 184

FLOYD DINAN, MILTON POPLEES, FRANK CASTELUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the County Court of Westchester County, State of New York

BRIEF OF RESPONDENT IN OPPOSITION

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Argument	2
Conclusion	5

CITATIONS

Cases:

Nardone v. United States, 302 U. S. 379	4
Nardone v. United States, 308 U. S. 338	4
Weiss v. United States, 308 U. S. 321	4
Schwartz v. Texas, 344 U. S. 199	2, 3
Benanti v. United States, 355 U. S. 96	3, 4, 5
Wolf v. Colorado, 338 U. S. 25	4
People v. Defore, 242 N. Y. 13, Certiorari Denied 270 U. S. 657	5

PAGE

People v. Adams, 176 N. Y. 351, Affirmed 192 U. S. 585 5

People v. Saperstein, 2 N. Y. 2d 210, Certiorari Denied 353 U. S. 946 5

People v. Variano, 5 N. Y. 2d 391, 185 N.Y.S. 2d 1 .. 5

Statutes:

47 U.S.C. § 605 2

United States Constitution:

Fourth Amendment 4

Article VI 5

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BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the County Court of Westchester County (App. B of Petition) is reported at 15 Misc. 2d 11. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department (App. A of Petition) is reported at 7 A. D. 2d 119. The decision of the Court of Appeals and the order of the County Court of Westchester County incorporating the remittitur of the New York Court of Appeals are printed in the Petition at App. C and D respectively.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Does Section 605 of the Federal Communications Act render inadmissible evidence obtained as the result of wire tapping by state law enforcement officers pursuant to Section 813-a of the New York State Code of Criminal Procedure in a state tribunal?

Statute Involved

The pertinent provision of the Federal Communications Act (47 U.S.C. § 605) is set forth in the Petition at page 4.

Statement

The Petition at pages 1 and 2 adequately sets forth the history of litigation.

Argument

The alleged issue presented in the Petition has been unequivocally settled and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

Schwartz v. *Texas*, 344 U. S. 199, held that wire tap evidence is admissible in a state court where it has been obtained by state agents.

Despite the protestations of petitioners, *Schwartz* v. *Texas* is a living, vibrant decision and very much the law of the land today. Mr. Justice Minton who delivered the

opinion of the Court, very pointedly remarked that (p. 202):

> "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly . . ."

The recent decision of the Supreme Court on this subject, *Benanti* v. *United States*, 355 U. S. 96, not only did not relegate the *Schwartz* decision to the archives as of only historical interest, but has strengthened the rationale of that decision as a bulwark against transgression of state sovereignty. Mr. Chief Justice Warren in setting forth the basis of the Court's holding in the *Schwartz* case, stated in part in the opinion of the Court in the *Benanti* case at page 101:

> "The rationale of that case is that despite the plain prohibition of Section 605, due regard to federal state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect."

If there was any doubt as to whether *Schwartz* v. *Texas* remained in full force and effect after the *Benanti* decision, this was completely dispelled by footnote 19 (p. 106) appearing at the end of the Court's dissertation concerning the Federal Communications Act as a comprehensive scheme for the regulation of interstate communication:

> "[19] Schwartz v. Texas, supra, is not to the contrary. While it refused to overturn a state rule of evidence, the Court was satisfied that the action of the state officials nonetheless violated § 605. 344 U. S., at 202."

This Court has construed Section 605 of the Federal Communications Act as rendering inadmissible in a Court of the United States, communications intercepted and sought to be divulged in violation thereof. *Nardone* v. *United States*, 302 U. S. 379. The second *Nardone* decision[1] extended this rule of evidence in United States Courts so as to render equally inadmissible the fruit of the poisonous tree, and by *Weiss* v. *United States*, 308 U. S. 321, telephone calls, purely intrastate in character, were included in the exclusionary rule.

The reversal of the judgment in the *Benanti* case (*supra*) is merely a logical extension of the rationale of the *Nardone* decisions. Were this not the fact, then the exclusionary rule of evidence in Federal Courts could be circumvented by the mere use of illegally intercepted communications obtained by state law enforcement agencies under an unwritten gentleman's agreement.

It must be conceded that Section 605 of the Federal Communications Act makes the interception and divulgance of telephone communications an illegal act. The Supreme Court of the United States in the exercise of its supervisory power over the Federal Court system, has extended the rule to prevent the use of evidence obtained in violation of Section 605 to sustain a federal conviction —no matter who the agent.

Even if such evidence be deemed illegally obtained analogous to evidence obtained in violation of the Fourth Amendment, the strongest federal mandate derived from the Constitution itself does not require state rules of evidence to conform to the federal exclusionary rule. *Wolf* v. *Colorado*, 338 U. S. 25, while clearly enunciating the application to the states of the Fourth Amendment to the Federal Constitution concerning search and seizure, nevertheless did not compel them to adopt the federal rule excluding evidence obtained thereby. And the uniform rule

[1] 308 U. S. 338.

in New York to the contrary has gone undisturbed by the United States Supreme Court. *People* v. *Defore*, 242 N. Y. 13, Cert. denied 270 U. S. 657; *People* v. *Adams*, 176 N. Y. 351, Affirmed 192 U. S. 585.

Moreover, the New York State Courts have repeatedly taken into consideration the anomalous situation presented by the *Benanti* decision. *People* v. *Saperstein*, 2 N. Y. 2d 210, Cert. denied 353 U. S. 946, and more recently in *People* v. *Variano*, 5 N. Y. 2d 391, 185 N.Y.S. 2d 1.

Thus the police power of the States remains undisturbed with respect to the rules of evidence in state tribunals.

Hence, petitioners' argument that the Federal Communications Act by virtue of Article 6 of the Constitution of the United States is the supreme law of the land and therefore binding on the judges in every state is fallacious. Both the Supreme Court of the United States and the Court of Appeals of the State of New York have recognized the prohibition contained in the Federal Communications Act. The Supreme Court has, through its supervisory powers over the Federal Court system, prevented federal conviction by evidence obtained in violation thereof, but has not extended this exclusionary rule of evidence to state law enforcement agents in state tribunals and no valid reason is presented here why this rule should be altered.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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